



POLICE DEPARTMENT

April 29, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Lenin Garcia
Tax Registry No. 947754
43 Precinct
Disciplinary Case No. 2013-10527

Police Officer Camilo Rosario
Tax Registry No. 946188
43 Precinct
Disciplinary Case No. 2013-10529

Police Officer Jose Taveras
Tax Registry No. 948143
43 Precinct
Disciplinary Case No. 2013-10531

The above-named members of the Department appeared before me on December 11, 2014, charged with the following:

Disciplinary Case No. 2013-10527

1. Said PO Lenin Garcia, on or about October 19, 2012 at approximately 1530 hours, while assigned to the 43 Precinct and on duty, in the vicinity of [REDACTED], Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he stopped Person A's vehicle without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT –
PROHIBITED CONDUCT

2. Said PO Lenin Garcia, on or about October 19, 2012 at approximately 1530 hours, while assigned to the 43 Precinct and on duty, in the vicinity of [REDACTED] Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched Person A's vehicle without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT –
PROHIBITED CONDUCT

3. Said PO Lenin Garcia, on or about October 19, 2012 at approximately 1530 hours, while assigned to the 43 Precinct and on duty, in the vicinity of [REDACTED] Bronx County, abused his authority as a member of the New York City Police Department, in that he frisked Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 – STOP AND FRISK

Disciplinary Case No. 2013-10529

1. Said PO Camilo Rosario, on or about October 19, 2012 at approximately 1530 hours, while assigned to the 43 Precinct and on duty, in the vicinity of [REDACTED] Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he stopped Person A's vehicle without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT –
PROHIBITED CONDUCT

2. Said PO Camilo Rosario, on or about October 19, 2012 at approximately 1530 hours, while assigned to the 43 Precinct and on duty, in the vicinity of [REDACTED] Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched Person A's vehicle without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT –
PROHIBITED CONDUCT

Disciplinary Case No. 2013-10531

1. Said PO Jose Taveras, on or about October 19, 2012 at approximately 1530 hours, while assigned to the 43 Precinct and on duty, in the vicinity of [REDACTED] Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he stopped Person A's vehicle without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT –
PROHIBITED CONDUCT

2. Said PO Jose Taveras, on or about October 19, 2012 at approximately 1530 hours, while assigned to the 43 Precinct and on duty, in the vicinity of [REDACTED], Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he frisked Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 – STOP AND FRISK

3. Said PO Jose Taveras, on or about October 19, 2012 at approximately 1530 hours, while assigned to the 43 Precinct and on duty, in the vicinity of [REDACTED], Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 3 – STOP AND FRISK

The Civilian Complaint Review Board was represented by Raasheja Page, Esq.
Respondents were represented by John Tynan, Esq.

Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2013-10527

Respondent Garcia is found Not Guilty.

Disciplinary Case No. 2013-10529

Respondent Rosario is found Not Guilty.

Disciplinary Case No. 2013-10531

Respondent Taveras is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is not disputed that on October 19, 2012, Respondents were on duty, in uniform, in an unmarked Department vehicle, assigned to the 43 Precinct's Street Narcotics Enforcement Unit (SNEU), serving as the apprehension team. At about 1530 hours, at the intersection of [REDACTED] in the Bronx, Respondents stopped a car being driven by Person A.

The Civilian Complaint Review Board's Case

Since Person A did not appear to testify at this trial,¹ the Civilian Complaint Review Board (CCRB) attorney offered in evidence the transcript of Person A's January 18, 2013, in person interview at CCRB [Civilian Complaint Review Board Exhibit (CCRBX) 1]. The following is a summary of that interview:

Person A stated that he parked his black Toyota near his [REDACTED] residence at [REDACTED] [REDACTED] and that after visiting with her he re-entered the car and drove away. In the rear seat of the vehicle was Person A's [REDACTED] daughter. While he was on his way to pick up his [REDACTED], his vehicle was stopped by Respondents. The three officers exited their vehicle and approached Person A's car. Respondent Garcia stood at Person A's

¹ The CCRB attorney received a voice mail from Person A on Dec. 10, 2014, in which he stated that he would not be coming to the Trial Room to testify. Person A gave no indication that he wanted to testify at this trial.

driver's side window, a second officer was at the front passenger side window, and a third officer stood at the rear of Person A's vehicle.

After Respondent Garcia told Person A that "there is a funny smell in the vehicle" and that "it smells funny in there, it smells like marijuana," Person A told him, "You're smelling the cigarette I just finished smoking." Respondent Garcia ordered him to get out of the car. Person A complied. Outside the vehicle, Respondent Garcia "patted" around Person A's chest and under his arms. Person A was then told to step to the rear of his vehicle. The shorter officer stood with Person A there while Respondent Garcia and the other officer searched the inside of the car. Person A stated that the officers looked underneath the vehicle's seats, that they entered the rear seating area and moved his daughter's car-seat to look underneath it. The search lasted for about 20 minutes. The officers never opened the trunk of his car. While the interior of the vehicle was being searched, Person A was searched by the shorter officer. During the search of Person A's person, the shorter officer patted him down and removed from his front pants pocket a "cockroach jar" and a "syringe" which are tools Person A uses for his work as an exterminator.

Respondent Garcia put on gloves and searched Person A's person by putting his hand into all of Person A's pants pockets and his groin area. Respondent Garcia took out handcuffs and told Person A to put his hands behind his back because "we're going to have to arrest you" and that "ACS" would have to be contacted regarding his daughter. Person A stated that he never believed that he was actually going to be arrested and that Respondent Garcia was merely trying to "trick" him. Person A was not arrested and was permitted to drive away. Person A observed that his car's floor mats had been pulled up, the glove compartment and center console had been opened, and that his groceries had

been knocked over. Person A did not "have none of the badge names" since he was "nervous" because "when I was 18 I was beat up by the police so me looking at their badges is irrelevant, what I'm thinking of is, don't hit me, you know." He later saw Respondent Garcia in uniform inside a post office and recognized him as the officer who had approached the driver's side window.

Respondent Garcia

Respondent Garcia testified that the reason that the SNEU team was watching [REDACTED] was because they had information about an individual that was selling narcotics out of that building. Police Officer Ronald Cruz was assigned to the observation post. His job was to spot drug transactions and to then radio the apprehension team of Garcia, Rosario and Taveras, who were parked out of view in an unmarked vehicle. Respondent Garcia received a radio transmission from Cruz who stated that a Hispanic male, wearing gray clothing, had just been observed exchanging cash for "small objects" from the suspected drug dealer. Cruz informed them that the male was driving a black Toyota [REDACTED]. About five minutes later, he observed and stopped a black Toyota [REDACTED]. Respondent Garcia testified that when he approached the driver's side window of the car, in the rear of the car he saw a young girl in a car seat.

Respondent Garcia recalled that Person A's vehicle had a "strong odor of marijuana." He asked Person A to step out of the vehicle. When he peered into the vehicle he observed "marijuana butts" in the vehicle's cup holder. When Respondent Garcia asked Person A about the marijuana butts, Person A told him that "he had just smoked these marijuana cigarettes." Respondent Garcia explained to Person A that the reason they

stopped him was because he was observed at [REDACTED] exchanging money for small objects. person A agreed that he was at the location but he told Respondent Garcia he was there visiting his aunt. person A asked Respondent Garcia if he could give him "a break" and not arrest him. Respondent Garcia conferred with the other two Respondents and they agreed to allow person A to leave. He told person A to go home and warned him that he "shouldn't be buying marijuana with [his] daughter in the car."

On cross-examination, he agreed that Cruz had transmitted the vehicle's description as a small black Toyota with no further details. When he received Cruz's transmission, he was parked about three blocks away. He confirmed that the marijuana butts he observed in the cup holder were not vouchered or tested. He asserted that based on his training and field experience, he could "attest that those were marijuana cigarettes." He asserted that person A had admitted to him that he had just smoked marijuana. He agreed that even though he saw nothing to indicate that person A was armed, he frisked person A's waistband and unzipped his sweater. He asserted that he did not search person A's car, he only looked underneath the front driver's seat. He confirmed that either Respondent Rosario or Respondent Taveras had also looked into the vehicle.

Respondent Taveras

Respondent Taveras recalled that he approached person A's vehicle on the driver's side behind Respondent Garcia. He stated that there was a "strong odor of marijuana" coming from the vehicle. He was able to identify the smell of marijuana based on his training and experience as a SNEU officer. After person A exited the vehicle he admitted to Respondent Garcia that he had just smoked marijuana. At some point, the three

Respondents discussed whether or not to arrest Person A. After considering they would have to call the Administration for Children's Services (ACS) regarding the child in the rear seat and that Person A could lose his job, Respondent Taveras testified that "we decided to let him go."

On cross-examination, Respondent Taveras testified that he recalled seeing what he believed to be marijuana butts inside the vehicle. When Person A exited the vehicle he was frisked by Respondent Garcia. Respondent Taveras observed that Person A's eyes were red. At one point, Respondent Taveras and Person A were standing together at the rear of Person A's vehicle. Respondent Taveras testified that he conducted a second frisk of Person A for his personal safety. During the frisk, Respondent Taveras felt something and put his hand into Person A's pants pocket but no weapon was recovered.

Respondent Rosario

Respondent Rosario recalled that about three to five minutes passed between Cruz' radio transmission and when they saw Person A's vehicle. After Person A's vehicle was stopped, he approached the front passenger window. After Respondent Garcia asked Person A to exit the vehicle, he signaled that there was something inside of the car and so he opened the passenger side door, leaned the top half of his body into the vehicle and looked around the center console area. He was leaning inside the vehicle for no more than 15 seconds. They used their discretion and decided not to arrest Person A. In total the vehicle stop lasted about five minutes.

On cross-examination, he confirmed that he had looked around the front passenger seat and the floor in the front of the seat and that although he had peered into

the back seat area by leaning into the front passenger seat, he did not enter the rear seating area.

FINDINGS AND ANALYSIS

The charges that Respondents stopped Person A's vehicle without sufficient legal authority

Since Respondents were assigned as the SNEU apprehension team, their job was to stop individuals based on information transmitted to them by Cruz, who was assigned to the observation post. Respondent Garcia offered unrefuted testimony that he has personally been involved in drug arrests at or near [REDACTED]; that Cruz was watching [REDACTED] because the SNEU team had received information an individual that was selling narcotics out of that building; that Cruz radioed that the driver of a black, Toyota had stopped his vehicle in the vicinity of [REDACTED]; that Cruz stated that he had just observed the driver handing cash to the suspected drug dealer in exchange for small objects; and that Cruz described the driver as a Hispanic male.

It is not disputed that Person A drove his black Toyota in the vicinity of [REDACTED] because at his CCRB interview he stated that he had parked his black Toyota near his aunt's residence which was at [REDACTED]. Moreover, Person A met the description of the driver provided to the apprehension team by Cruz.

The Court of Appeals has held that a police officer may lawfully conduct a stop by relying on information conveyed by a fellow officer who has personal knowledge of the conduct which justifies the stop² because the officer who performs the stop has the right to assume that the information conveyed by the fellow officer is reliable until

² People v. Petralia, 62 NY2d 47, 474 NYS2d 441 (1984).

proven otherwise.³ This “fellow officer rule” has been applied in Departmental disciplinary decisions. In *Case No. 2002-78173* (May 10, 2004), an officer who was charged with having wrongfully stopped a suspect was found not guilty because the stop was based on a description that had been provided to the officer by an undercover officer (UC) of a male who had sold drugs to the UC. Also, in *Case No. 2007-82894* (March 15, 2010), a sergeant who was charged with having stopped two civilians without sufficient legal authority was found not guilty because the sergeant, who was supervising a narcotics operation, had relied on a description communicated to him by an officer he was supervising. Finally, in *Case No. 2013-9627* (June 17, 2014), a lieutenant was found not guilty of participating in an unjustified car stop because he had the right to rely on a fellow officer’s claim that he observed excessive tinting on the windows of the car.

Thus, I find that Respondents had the right to rely on the information contained in Cruz’ radio transmission. As a result, Respondents are found not guilty of having stopped Person A’s vehicle without sufficient legal authority.

The charges that Person A was frisked and searched and that his car was searched without sufficient legal authority

Respondent Garcia and Respondent Taveras are charged with having frisked Person A without sufficient legal authority; Respondent Taveras is charged with having searched Person A without sufficient legal authority; and Respondent Garcia and Respondent Rosario are charged with having searched Person A’s vehicle without sufficient legal authority.

³ *People v. Dodt*, 61 NY2d 408, 369 NYS2d 67 (1984).

Since Person A failed to appear to testify at this trial, the CCRB prosecutor offered his CCRB interview as hearsay evidence (CCRBX 1).

Person A's failure to appear to testify

Although the constitutional right of confrontation is confined to criminal proceedings, the United States Supreme Court has held that, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."⁴ The New York Court of Appeals has recognized a limited right to cross-examine adverse witnesses at administrative hearings and has held (in a case involving an NYPD disciplinary trial) that one of the factors a hearing officer should consider in assessing whether due process requires the production of a particular witness for cross-examination is the potential utility of trial confrontation in the fact-finding process.⁵

Although hearsay is admissible at Department disciplinary trials and may form the sole basis for making findings of fact,⁶ even where hearsay testimony is supported by circumstantial evidence it may be insufficient to support a finding of guilt in a disciplinary trial that involves close questions of credibility.⁷ The determination of the instant charges involves close questions of credibility.

Respondent Garcia and Respondent Taveras both testified that they had smelled an odor of marijuana emanating from inside the car and Respondent Taveras corroborated

⁴ Goldberg v. Kelly, 397 US 254, 269.

⁵ Gordon v. Brown, 84 NY2d 574, 620 NYS2d 749, 1994 NY LEXIS 4196.

⁶ RCNY Title 38, 15-04(e)(1).

⁷ Eppler v. Van Alstyne, 93 AD2d 930, 462 NYS2d 320, 1983 NY App Div LEXIS 17824.

Respondent Garcia's claim that Person A had admitted to Respondent Garcia that he had just smoked marijuana. Respondent Garcia further testified that he saw butts inside a cup holder in the console area next to the driver's seat and that based on his training and experience regarding identifying burnt marijuana butts, "I can attest that those were marijuana cigarettes."

Even though Person A admitted at his CCRB interview that Respondent Garcia had told him that "there is a funny smell in the vehicle" and that "it smells like marijuana," when Person A asserted that he had told Respondent Garcia, "You're smelling the cigarette I just finished smoking," the CCRB interviewer appears to have merely accepted Person A's explanation because he never even asked Person A whether he had ever smoked marijuana much less whether he had been smoking marijuana just before the Respondents pulled his car over. Since Person A refused to appear to testify at this trial, Respondents' attorney did not have the opportunity to cross-examine him to test the credibility of his claim that he had been smoking a tobacco cigarette not a marijuana cigarette.

Whether Person A's hearsay claim that he was smoking tobacco is more credible than Respondent Garcia's testimonial claim that he saw marijuana butts and that Person A admitted smoking marijuana is crucial to these charges because if I credited Person A's hearsay I would conclude that Respondents had insufficient legal authority to frisk and search Person A. But if I credited Respondent Garcia's and Respondent Taveras's testimony then I would find that they had probable cause to arrest Person A for possession

of marijuana and, consequently, that Respondents had sufficient legal authority to frisk and search Person A's person pursuant to an arrest.⁸

Similarly, the question of whether Respondent Garcia and Respondent Rosario searched Person A's vehicle without sufficient legal authority involves close questions of credibility. Respondent Garcia testified that he did not search the car and that he only looked underneath the driver's seat. Respondent Rosario testified that he only leaned into the front passenger side of the car and looked around the front seating area, the center console and the floor, and peered into the rear seating area. Based on their own descriptions of their non-entry, visual-only inspections of the car's interior, these inspections do not constitute improper searches.⁹

In contrast, Person A asserted at his CCRB interview that Respondent Garcia and an officer who had to be Respondent Rosario entered and searched the front and rear seating areas of the vehicle, that they had searched through bags of groceries on the front and rear seats, that they had searched the glove compartment, that "everything was on the floor," and that they had searched the car seat because "I saw them move it."

Since Person A refused to testify at this trial, Respondents' attorney did not have the opportunity to question him regarding admissions he made to his CCRB interviewer about his inability to see what the officers were doing inside his car. When his interviewer asked him, "Were you able to see that search or, or was it after when you

⁸ Although Person A asserted that he never believed that he was actually going to be arrested, even though handcuffs were displayed, he was told to place his hands behind his back, and he was told that he was being arrested, the Court of Appeals has held that in determining whether an individual is being arrested, the standard to be applied is not whether the suspect believes that he is being arrested, but, rather, whether a reasonable person, innocent of any crime, would have believed he was being arrested if he was in Person A's position. See *People v. Hicks*, 68 NY2d 234, 239, citing *People v. Yuki*, 25 NY2d 585, 589. See also, *People v. Robinson*, 282 AD2d 75 (1st Dept).

⁹ See Legal Bureau Bulletins, Vol. 44, No. 5 and Vol. 12, No. 3.

went [back] in [your car] that you saw everything was..." Person A answered, "After I went in because they didn't let me look back" while he was standing at the rear of the car where he could, at best, only have seen the interior of his car through the rear window of the car even as Respondent Taveras was, so Person A alleged, telling him not to look back at the car.

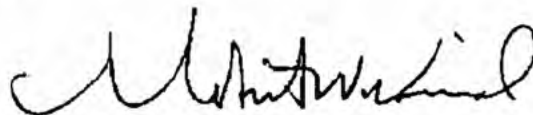
Finally, since Person A refused to testify at this trial, Respondents' attorney did not have the opportunity to question him as to whether he was embellishing his version of this event, and whether he has an anti-police bias, based on his statement to his CCRB interviewer that the reason that he had not looked at the name tags of any of the three officers was because he was "nervous" since "when I was 18 I was beat up by the police so me looking at their badges is irrelevant, what I'm thinking of is, don't hit me, you know."

In conclusion, I find that Person A's uncorroborated and untested by cross-examination hearsay constitutes insufficient evidence to meet the CCRB prosecutor's burden of presenting credible evidence which proves these charges by a preponderance of the credible evidence. Therefore, Respondents are found not guilty of these charges.

APPROVED

JUN 22 2015
William J. Bratton
WILLIAM J. BRATTON
POLICE COMMISSIONER

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner – Trials